

In The  
**Supreme Court**  
of the United States

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OCTOBER TERM, 1945

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CORNUCOPIA GOLD MINES, a private Corporation,  
*Petitioner and Appellant,*

vs.

CARL LOCKEN, Administrator of the Estate of Anna  
Locken, Deceased,  
*Respondent and Appellee.*

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**Brief in Support of Petition  
for Writ of Certiorari**

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**PRELIMINARY STATEMENT**

The opinion of the Circuit Court of Appeals for which review is sought appears in the Record is at Page 269. The summary "statement of the matter involved" set forth in the foregoing petition for Writ of Certiorari contains all that is material, as a "statement of the case" for consideration of the questions presented, and in the interest of brevity, it will not be repeated here.

## JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U.S.C.A. 347). The Circuit Court of Appeals has decided an important local question, basing its decision upon general law and neglecting to declare the local law in issue, and further, the Circuit Court of Appeals by its decision has sanctioned a departure from the accepted and usual course of judicial proceedings by the lower court to such an extent as to call for an exercise of this Court's power of supervision. For these reasons and for the reasons set forth in petitioner's jurisdictional statement in its foregoing petition, which by reference is incorporated herein, Petitioner submits this Court has jurisdiction.

## SPECIFICATION OF ERRORS

### I

The Circuit Court erred in failing to declare the Oregon law in issue and in upholding judgment allowing plaintiff to recover for death of deceased person who under the Oregon law was at most a mere licensee.

### II

The Circuit Court erred in failing to reverse District Court for its failure to declare the legal relationship of

the parties and its failure to declare the status of deceased on premises where accident occurred, and its failure to declare what legal duty defendant owed to deceased.

### III

The Circuit Court erred in failing to reverse District Court for its failure to comply with Rule 52 (a) of Federal Rules of Civil Procedure.

### IV

The Circuit Court erred in that there is insufficient evidence under the Oregon law to support the conclusions of said Court and particularly the conclusion that petitioner would be liable even if deceased "was a technical or other kind of trespasser" on its property, and the conclusion that petitioner was guilty of "wanton" negligence, and the conclusion without any evidence to support it that other persons owned property under petitioner's power line.

### POINT I

The Circuit and District Courts erred in failing to declare the Oregon law in issue and in upholding judgment allowing plaintiff to recover for death of deceased person who under the Oregon law was at most a mere

licensee. In Oregon one who goes upon the premises of another merely "by permission or toleration" is termed a "mere licensee" to whom "the owner of the premises owes no greater duty than to avoid wilful or wanton injury to the licensee".<sup>1</sup>

## ARGUMENT

The lower courts here have refused to decide the local law. It is not a case of misapplying the local law; it is a case of refusing to decide what the local law is. The relationship of the parties must be determined in order to know what principle of law applies. The status of deceased is left undecided, yet her status is the basis which must be used to determine the rights and liabilities of the parties. The Circuit Court thought she might have been a trespasser. The District Court says deceased was not a trespasser, but how could any court know whether deceased was a trespasser without knowing whose property she was on. Obviously neither could determine what her status was on the premises without knowing whose premises the accident occurred on. Neither court goes far enough; they both leave undecided her actual status. Was she an invitee? Was she a licensee?

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<sup>1</sup> The leading Oregon case is *Lange v. St. Johns Lumber Co.*, 115 Or. 337; 237 Pac. 696—which together with other Oregon authorities down to date establishing the same point are brief herein under Point II.

To hold that she was an invitee would be in conflict with Oregon law; to hold she was a licensee requires a showing of "wilful or wanton" injury under the Oregon law, and hence no liability under the facts here. The District Court, although specifically requested to do so, neglected to say what degree of care was required. It merely said Petitioner was held to "due care." Obviously "due care" is an indefinite phrase, and it fails to give any definite yardstick for measuring liability. For instance, if deceased was a licensee, "due care" would mean simply to refrain from "wilful or wanton" injury, whereas, if deceased was an invitee, petitioner would be held to the duty of exercising "ordinary care" for her safety. As an example, under the Oregon Guest Statute "due care" would not be "ordinary negligence" but would be gross negligence. If the Court meant "ordinary care" there is no evidence to support such legal conclusion in the absence of a finding determining decedent's status and a further finding that the accident occurred on the premises of some third party. The Oregon law establishing the foregoing statements is briefed under Point II herein.

This Court has held that Federal Courts must declare and apply the local state law in a case involving the very same questions presented here; namely, whether liability can be imposed in a Federal Court on a defendant under general law for ordinary care, where his own

state has a rule merely to refrain from "wilful and wanton" injury.<sup>2</sup> That Federal Courts in applying general law invade "rights which \* \* \* are reserved by the Constitution to the several states." Petitioner in its briefs below contended that the Oregon law controlled.<sup>3</sup>

There is a complete hiatus in this case between the facts and the law. Neither the Circuit Court nor the District Court would declare the law presented to it. The point involved here is of great importance in the State of Oregon and the procedure followed by both courts below displays either a gross misconception of the Erie decision by this Court or a disinclination to follow it—tremendous fundamental rights are involved and this Court should exercise its power of supervision by granting review.

## POINT II

*The foundation of tort liability must be based on the legal relationship of the parties. In order to determine*

<sup>2</sup> Erie v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188.

<sup>3</sup> We quote from Petitioners' brief in Circuit Court, page 22:

"Under the decision of Erie Railroad v. Tompkins,, 304 U. S. 64, 82 L. Ed. 1188, the Oregon law is to be applied here, and we therefore do not rely on decisions from other jurisdictions." And page 13: "we deal here with the law of Oregon respecting what duty of care is imposed upon a property owner to a licensee or trespasser, and we show herein that its duty is the same whether a person be licensee or trespasser and whether the injury is from a charged electric wire or through some other dangerous condition on the owner's premises. The Supreme Court of Oregon has stated the law respecting both situations. The leading case in Oregon is Lange v. St. Johns Lumber Company, (115 Or. 337), 237 P. 696, in which the Court defines the difference between an invitee and a mere licensee and holds that in order to be an invitee there must be some mutuality of interest shown, \* \* \*."

*the legal relationship of the parties, it is necessary here to know two things: (a) on whose property the accident occurred, and (b) the status of deceased on that property. The judgment here should be reviewed because until these questions are answered, it is impossible to declare the applicable law. The Circuit Court in upholding the judgment has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. (Sup. Ct. Rule 38 (b) )*

## ARGUMENT

The relationship of the parties is a pivotal question in this case. The status of decedent at the place where the accident occurred calls for one principle of law if she was an invitee, and a different principle of law if she was a licensee or trespasser. The uncontradicted evidence is that decedent was there solely for her own pleasure, that she had no business or mutual interest with Petitioner; that she was not invited there by Petitioner. Under these facts, if the accident occurred on Petitioner's property, the Oregon law is that decedent at best would be a **MERE LICENSEE.**<sup>1</sup>

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<sup>1</sup> Page references are to Oregon reports:

(Page 343): "There is a difference between one present on premises by an invitation, express or implied, and one who is merely there by permission or toleration. The one is termed an invitee and the other mere licensee. As to the former, the owner of the

Respondent undertook by the theory of his complaint, as incorporated in the Pre-trial Order and by the testimony produced at the trial, to establish that the place of the accident was on property owned or controlled by some third party (R 137, 138). His proof totally failed, and the District Court stated it was unsatisfied with the proof and expressly refused to make a finding of fact that the place of the accident was on some third party's property.<sup>2</sup> Under the Oregon law, this was error, because the plaintiff failed to establish the essential element in his case.<sup>3</sup>

We deal here with the law of Oregon respecting what duty is imposed upon a property owner to a licensee or trespasser, and we show herein that the duty is the same whether a person be licensee or trespasser and whether the injury is from a charged electric wire or through some other dangerous condition on the owner's premises. The Oregon Supreme Court has stated the law respecting

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premises is bound to use reasonable care to prevent the infliction of hurt upon the invitee: *Keeran v. Spurgeon Mercantile Co.*, 194 Iowa, 1240 (191 N. W. 99, 27 A.L.R. 579). As to the latter, *the owner of the premises owes no greater duty than to avoid willful or wanton injury to the licensee.*" (*Lange vs. St. Johns Lumber Co.*, 115 Or. 337 (237 Pac. 696), P. 343 (Or.)) (*Emphasis ours*)

<sup>2</sup> R 252, 253:

"The Court does not find evidence enough in the record to determine whether or not this wire lay upon property of the defendant or upon property owned by some other person, . . ."

"I would answer the question squarely, if I thought I could, but from the evidence I don't think it can be, and I won't make a finding against the defendant."

And the Court to Respondent's attorney (R. 257);

"The Court: No, you are trying to make me find on one side or the other, and I do not think the evidence is sufficient to find one way or the other."

<sup>3</sup> Plaintiff had burden of proof under authorities briefed—but District Court likewise failed to determine this question although raised in Pretrial order.

both situations. The leading case in Oregon is *Lange v. St. Johns Lumber Company*,<sup>1</sup> Supra, in which the Court defines the difference between an invitee and a mere licensee and holds that in order to be an invitee there must be some mutuality of interest shown. The Oregon Court in deciding the question quotes with approval from numerous decisions from other jurisdictions in support thereof.<sup>4</sup>

The Oregon Supreme Court holds the same doctrine applies to a broken electric wire such as we have in the instant case.<sup>5</sup> That was an action against an electric company in a **BROKEN WIRE** case for damages re-

<sup>4</sup> In the *Lange* case the Oregon Court quotes with approval P. 345 Oregon Reports:

"It is well settled there that to come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant."

The Oregon Court in support of its decision states (P. 344): "In *Vanderbeck v. Hendry*, 34 N.J.L. 467, the Supreme Court held that mere permission to pass over dangerous lands, or an acquiescence in such passage for the benefit or convenience of the licensee, creates no duty on the part of the owner except to refrain from acts willfully injurious. The premises on which the injury in that case happened were private grounds, used for a lumber yard, on which lumber was piled, leaving passageways between the piles for the convenience of loading and unloading. The yard was not enclosed and persons were in the habit of passing through these gangways to go from street to street. The plaintiff, out of curiosity, went into one of the gangways and was injured by the falling of a pile of lumber which had been piled in a negligent manner. The court held that an action for such injury could not be maintained; that mere permission, or passive license to enter upon lands, relieved a person entering premises from the responsibility of being a trespasser, but that he enjoyed the license, assuming the ordinary risks of the nature of the place and the business carried on upon it. \* \* \* All that may be said in favor of a mere licensee is that he is only not a trespasser, and the general rule of law is that the owner and occupier of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees and others who come upon the premises for their own convenience or pleasure, however innocent their purpose may be."

<sup>5</sup> *Kesterson et al v. California-Oregon Power Company*, 114 Or. 22 (228 Pac. 1092) (P. 25, Oregon Reports): "On demurrer to the complaint, wherein both the instruments appear as exhibits, the defendant maintains that in placing his lumber on the right of way as created by the writing of May 2, 1912, Kesterson was a trespasser to

sulting therefrom. The Plaintiff there sought to recover on grounds of ordinary negligence. The Court, after considering the relationship of the parties in order to determine what duty, if any, defendant owed to plaintiff, held there was no duty other than to avoid "wilful or wanton" injury.<sup>6</sup>

The Lange case, *supra*, is still good law in Oregon and is followed down to date.<sup>7</sup> The Lange case has like-

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*whom, or to whose property, the defendant owed no duty further than to avoid the infliction of wilful or wanton injury and that, as the complaint does not charge such a tort, it does not state facts sufficient to constitute a cause of action."*

The Court in sustaining the demurrer states (P. 29): "The analogy is strong between high-powered electric lines and railway tracks as places of danger and the necessity of their operators being allowed exclusive control of them. The reason of the rule is the same in both instances. The principle is illustrated by the following extract from the opinion of Mr. Chief Justice Lord in *Ward v. Southern Pacific Co.*, 25 Or. 433 (36 Pac. 166, 23 L.R.A. 715, 60 Am. & Eng. R. Cas. 34 12 Am. Neg. Cas. 516): 'The track is the private property of the company, and was not built to be used as a highway for pedestrians. Being intended for the sole use of the company, except at public crossings, the law will not sanction its use as a footpath. Nor will the fact that people may have frequently used the track to walk on change the law, or render their act less unlawful. \* \* \*'"

- <sup>6</sup> (P. 30): "They do not claim any license or permission from the defendant to occupy the latter's right of way with stacks of lumber; neither do they claim that the defendant wantonly, willfully or maliciously set fire to the lumber or the buildings. What then is trespass? 'Every unauthorized entry on land of another is a trespass even though no damage is done, or the injury is slight.' 38 Cyc. 995. In *Wilmot v. McPadden*, 78 Conn. 367 (65 Atl. 157, 19 L.R.A. (N.S.) 1101), Mr. Justice Hamersly thus enunciates the doctrine about who are trespassers and the duty of the land owner towards them:

"The owner or tenant of land has the right of exclusive possession; whoever violates this right is a trespasser; and such trespasser assumes all risk of danger which is incident to the condition of the premises; as to him the owner does not owe the legal duty of exercising care in keeping the premises in a safe condition for his use."

- <sup>7</sup> *Napier v. First Congregational Church*, 157 Or. 110, 115, 70 P. (2d) 43, said:

"An invitation to use the premises of another is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using them." And again in *Briggs v. John Yeon Co.*, 168 Or. 233, the Court quotes with approval from 38 Am. Jur., *Negligence*, 759, Par. 99, as follows:

(Page 242): "'One is not deemed to have been upon premises by implied invitation unless his purpose was one of interest or advantage to the owner or occupant. An invitation will be implied on behalf of one who enters the premises of another in pursuance of an interest or advantage which is common or mutual to him and the owner or occupant, but no more than a license is implied where one enters the premises of another, not in response to any inducement offered by the owner or occupant,

wise heretofore been followed by the Federal Court for the District of Oregon.<sup>8</sup>

### POINT III

There is a complete failure to comply with the requirement of Rules 52 (a) that findings of fact be specially made and separate conclusions of law stated thereon. The requirements of Rule 52 (a) of Federal Rules of Civil Procedure cannot be utterly ignored, and the Ninth Circuit in failing to enforce the rule has created a conflict with other Circuits which should be settled.

### ARGUMENT

Review should be granted because there has been a serious departure from the accepted and usual course of judicial proceedings by the Circuit Court of Appeals in its own consideration of this case, and it has sanctioned such a departure by the lower court as to call for an exercise of this Court's power of supervision. The District Court in neglecting to make a finding as to the relationship of the parties and refusing to find the status of the deceased on the premises where the accident occurred not only left unresolved the basic factual issue but left the case in the position where the local applicable law

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or for a purpose having some connection with a business actually or apparently carried on there, but for his own mere pleasure, convenience, or benefit.'"

<sup>8</sup> The Sudbury, 14 Fed. (2), 533, Decision by Judge Bean. "A licensee enters upon the premises of another at his own risk, and he takes the premises as he finds them, and the owner owes no duty to a mere naked licensee to keep the premises in a certain condition for the benefit of such licensee."

could not be decided. In short, the District Court entered judgment without determining the basic issues of either law or fact. This we submit is contrary to Rule 52 (a)<sup>1</sup> of the Federal Rules of Civil Procedure; it is a departure that gives rise to the very confusion that Rule 52 (a) was designed to guard against. When a Court sits both as judge and jury, it would be a dangerous step backward to permit such court to enter judgment upon personal undisclosed notions. If this is permitted, an orderly, effective appeal is impossible. The Ninth Circuit by its decision here has declined to follow interpretations by this Court respecting Rule 52 (a) and of other analogous rules designed to serve the same purpose; also its decision is in conflict with other circuits.

This Court in an analagous situation has declared that a litigant is entitled to a "fair compliance with the requirement of Rule 52 (a)," and further points out that such compliance is of the highest importance to an appellate court in order to have a proper review.<sup>2</sup>

Again in *Paramount Pictures Distributing Company v. United States of America*, 304 U. S. 55, 82 L. Ed.

<sup>1</sup> Rule 52. Findings by the Court. "(a) EFFECT. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; \* \* \*

<sup>2</sup> *Mayo v. Lakeland Highlands Canning Co.*, 309 U. S. 310, 84 L. Ed. 774:  
 "It is of the highest importance to a proper review by the United States Supreme Court of the action of a Federal District Court in granting or refusing a preliminary injunction against the enforcement of a state statute that there should be fair compliance with the requirement of Rule 52 (a) of the Rules of Civil Procedure with regard to the separate statement of findings of fact and conclusions of law." (Syllabus 3, p. 775, 84 L. Ed.)

1146, this Court, dealing with the equity rule which has the identical requirement that "the trial Court shall find the facts specially and state separately its conclusions of law thereon," in reversing the lower court's decree remanded the case, directing it "to state its findings of fact and conclusions of law" as required by the Rule.<sup>3</sup>

In *Beaumont Sour Lake & Western Railway Co., et al, v. United States of America, et al*, 282 U. S. 74, 75 L. Ed. 221, in considering an Interstate Commerce Commission case, this Court points out that the Commission has the same duty "specifically \* \* \* to report the facts and give the reasons" for its conclusions as has the lower courts, to the end that the grounds be known upon which they act.<sup>4</sup>

In *United States of America Interstate Commerce Commission et al, v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al*, 294 U. S. 499, 79 L. Ed. 1023, Justice Cardozo points out the necessity for a

<sup>3</sup> (P. 1147, 82 L. Ed.):

"The Court did not find the facts specially and state separately its conclusions of law as the rule required. The statements in the decree that in making the restrictive agreements the parties had engaged in an illegal conspiracy were but ultimate conclusions and did not dispense with the necessity of properly formulating the underlying findings of fact.

"The opinion of the Court was not a substitute for the required findings. A discussion of portions of the evidence and the Court's reasoning in its opinion do not constitute the special and formal findings by which it is the duty of the Court appropriately and specifically to determine all the issues which the case presents."

<sup>4</sup> (P. 230, L. Ed.):

"Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower Court setting for the reasons on which they base their decisions in cases analogous to this. *Wichita R. & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 58, 67 L. Ed. 124, 130, 43 S. Ct. 51. And we have recently emphasized the duty of such Courts fully to state the grounds upon which they act. \* \* \*"

finding of fact upon which an ultimate conclusion is based.<sup>5</sup>

The Fourth Circuit opinion by Parker, J., points out the requirement for finding on every material issue and for failure to comply holds the case must be remanded.<sup>6</sup>

The Seventh Circuit in the recent case of *Bowles v. Russell Packing Co.*, held in a matter dealing with an interlocutory injunction that a fair compliance with Rule 52 (a) relating to findings of fact and conclusions of law is mandatory.<sup>7</sup>

The Third Circuit, remanded for findings.<sup>8</sup>

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<sup>5</sup> (L. Ed. p. 1029):

"The statement in the second of these paragraphs that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated."

(L. Ed., p. 1032): "We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. \* \* \* The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. \* \* \* We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

<sup>6</sup> *Wessell, et al, v. Seminole Phosphate Co.*, 13 F. (2d) 999:

"These are the ultimate facts upon which the case turns, and there has been no sufficient finding with respect to them to justify the Court in declaring as a matter of law that there has or has not been a breach or a rescission by mutual consent. \* \* \* Where the ultimate facts in issue are not covered by the findings, this Court cannot supply them from evidentiary matters found, but must remand the cause for a new trial."

<sup>7</sup> 140 F. (2d) 354 (p. 355): "We think it proper to insist at all times upon fair compliance with Rule 52 (a). The ends of justice and orderly procedure will best be served by remanding the case to the District Court, with directions to make findings of fact and state its conclusions of law thereon."

<sup>8</sup> *Ordinary of State of New Jersey v. United States Fidelity & Guaranty Co.*, 136 F. (2d) 537: "After argument and examination of the briefs and appendices in this appeal, we are of the opinion that it is impossible to decide the issues presented without findings of fact by the Court below. *Hazeltine Corporation*, 3 Cir., 131 F. (2d) 34; *Clarke v. Gold Dust Corp.*, 3 Cir. 91 F. (2d) 12. Accordingly the judgment is reversed and the cause is remanded in order that the Court below may have the opportunity to make findings of fact and conclusions of law as required by Rule 52 (a)."

The Seventh Circuit, reversed because judgment denying injunction was not based on proper findings.<sup>9</sup>

The Third Circuit in *Hazeltine Corporation v. General Motors Corporation* is indefinite about the rule.<sup>10</sup>

The Congress has given this Court the power to make uniform rules for the Federal Courts, and the rules should be uniform in all circuits. This Court should place a final interpretation upon Rule 52 (a) and settle the apparent conflict which is developing between the circuits. Is the rule mandatory or not? Can a valid judgment be entered where the rule has been ignored? The decision here by the Ninth Circuit Court, which acquiesced in noncompliance of the Rule by the District Court, conflicts with the decisions *supra* from the Seventh and Fourth Circuits, and possibly with the decisions from the Third Circuit. There is a conflict because the Ninth Circuit not only sanctioned noncompliance of the Rule by the District Court but supplied factual issues itself in reaching its conclusion; in respect to the supplying of

<sup>9</sup> *Brown v. Quinlan, Inc.*, 138 F. (2d) 228 (p. 229):

"Obviously there was presented to the District Court a sharply drawn issue of fact going to the very essence of the complaint, namely, whether defendant had knowingly violated the regulations as charged. Upon the existence or non-existence of this fact depended almost entirely the propriety of the Court's disposition of the motion. Under Rule 52 (a) of the Federal Rule of Procedure it is the trial Court's duty to make findings of fact and conclusions of law."

<sup>10</sup> 131 F. (2d) 34: "The failure of the trial judge to comply literally with the provisions of Rule 52 (a), although it has been characterized as a 'dereliction of duty' is not always the ground for reversal and remand with instructions to make specific findings as required by the Rule. The latter course of action has been adopted where there was an inadequate statement of facts upon vital issues and where such factual issues were not resolved." (Citing cases)

facts to sustain the judgment. The Ninth Circuit appears to be in absolute conflict with the other circuits.

#### POINT IV

The Circuit Court erred in that there is insufficient evidence under the Oregon law to support the conclusions of said Court and particularly the conclusion that Petitioner would be liable even if deceased was "a technically or other kind of trespasser" on its property, and the conclusion that petitioner was guilty of "wanton" negligence, and the conclusion without any evidence to support it that other persons owned property under petitioner's power line.

#### ANALYSIS OF CIRCUIT COURT OPINION

The Circuit Court states:

"The Court below rightly concluded that other persons as well as appellant owned land or mining claims in the Canyon under Appellant's transmission line; • • •"

Such statement or finding is entirely unsupported by evidence. The only part of petitioner's land that was brought into question and covered by the surveys was the land in Red Jacket Canyon under petitioner's electric line where deceased was found. The District Court refused to find who owned this land. Without a finding

as to the ownership of the land, there is no basis for the Court to suggest that third parties own land under Petitioner's electric line. That is the question involved in this case. The Court at one place refuses to decide who is the owner and at another place concludes other persons "owned land" in the "Canyon under Appellant's transmission line" and in doing so directly contradicts itself; it makes no sense whatever and verges upon what is known as a "Goldwynism," i.e., "include me out," etc.

Again the Circuit Court states:

"that if the place where decedent came in contact with the wire was not on the mining claim of third parties such place was extremely close to the boundary line of (petitioner's) mining claim and at most within a few feet of the boundary line between the mining claims of (petitioner) and third parties."

The Court refused to find that the accident occurred off Petitioner's property as contended by Respondent, and the only other testimony was that the point of the accident was 85 feet inside Petitioner's property line. The Petitioner's power line at the point where this accident occurred is either on or not on its own property, and there should be no equivocation respecting this fact. The lower court in refusing to find the fact stated it would get around it by saying it was close to the boundary line "maybe within a few feet." The accident either occurred on the property

of some third party, or on the property of Petitioner and inside Petitioner's property line a distance of 85 feet.

The Court's statement amounts to nothing more than the accident may have happened on Petitioner's property, but even if it did, it only happened a few feet on Petitioner's property. This tends to obscure the actual fact, which is that the accident either happened 85 feet inside Petitioner's property line, or it didn't happen on Petitioner's property at all. A clear-cut issue was presented and a clear-cut finding should have been made. The same can be said with respect to the Circuit Court's statement that:

"vacationers and others in pursuit of their business and pleasure customarily leave access roads and go at will across wild unfenced mountainous mining lands like those here in our own Northwest country, and that in so doing they are not usually regarded as trespassers by the owners of such lands."

This is something else that the Circuit Court has put in its opinion which leads nowhere—it has neither stem nor root. The question is asked respecting the foregoing statement, what of it? Does it give an answer to the legal problem. Obviously not. The Circuit Court might have declared the law respecting such a situation as it was requested to do in the appeal below, and declare what the status of such persons would be. In Oregon people

who go on unfenced lands even with the owner's knowledge are there as mere licensees. It is true people do go on other people's land for their own pleasure. They go hunting, berry picking, etc., but even when they do it with the owner's knowledge such persons in Oregon occupy the status of mere licensees, as to whom the property owner owes no duty except to refrain from "wilful or wanton injury."

Circuit Court's finding or conclusion that Petitioner was guilty of "wanton" negligence is wholly without support either in the evidence or in any finding of the trial court, and the judgment cannot be upheld on that ground. Likewise, there is no evidence that the deceased was an invitee on Petitioner's premises, and judgment cannot be upheld on that ground. Actually, what the situation amounts to here is a case being put in issue and tried upon the theory that the accident occurred on land of a third party and when that theory fell through the District Court adopted a different factual theory, namely, that the accident occurred near the boundary line of Petitioner's property and entered judgment without disclosing any legal principle or legal theory to support it; the Court may have had in mind that Petitioner should have anticipated that a person such as the deceased would be there "playing" or "looking for mushrooms." Assuming the Court had some such theory in mind, it was still incumbent upon it to de-

clare what status that gave to the deceased upon the premises; this is fundamentally necessary in order properly to determine what if any legal liability exists. We have shown *supra* that deceased even under such assumed facts is a mere licensee if she was on Petitioner's land. The Circuit Court entered judgment upon still a third theory, basing its ruling upon the theory and the assumed fact that the accident occurred on Petitioner's premises but that the Petitioner was liable because it was guilty of "wanton" negligence. Rule 52 (a) was promulgated to prevent this very kind of confusion. Both Courts ignored the rule and bypassed the controlling factual situation in refusing to declare the relationship of the parties and define the status of the deceased on the premises. The District Court, without passing upon the controlling factual issue, simply stated that the Petitioner was held to "due care" which means nothing in the absence of knowing the legal relationship of the parties. The Circuit Court of Appeals declared that Petitioner was held to the exercise of "ordinary care" and imposed upon Petitioner an active duty to keep its premises safe for deceased and others who might enter upon its premises for her or their own pleasure and without any business with or invitation from Petitioner; this is directly in conflict with the Oregon law.

In Oregon it is settled law that the words "wilful" and "wanton" are synonymous terms in a tort action. A wrong

that is committed in order to be "wanton" must be intentionally or wilfully done. Neither gross negligence nor a conscious indifference of duty is the equivalent of "wanton" negligence.<sup>1</sup>

It is respectfully submitted that this petition for certiorari should be granted.

JAMES ARTHUR POWERS and  
DEAN H. DICKINSON,

*Counsel for Petitioner.*

R. A. IMLAY *of Counsel.*

Dated.....

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<sup>1</sup> Lee v. Hoff, 164 Or. 374 (97 Pac. (d) 715) P. 389: "Conscious indifference does not amount to willful or wanton disregard of duty." Also Rauch v. Stecklein, 142 Or. 286 (20 Pac. (2d) 387, P. 293.